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No. 97-2035

In The

Supreme Court of the United States

October Term, 1997

CAROLYN PROPERTIES I, CAROLYN PROPERTIES, JOIVECA CORPORATION, JLP HOLDINGS, INC., TK HOLDINGS, INC., HHC MIAMI INC. and UNIVERSAL CONSULTANTS, LTD., CO.,

Petitioners,

vs.

THE MITSUI TRUST & BANKING CO., LTD. and KAJIMA INTERNATIONAL, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT KAJIMA INTERNATIONAL, INC.

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following are parent companies of respondent, Kajima International, Inc. ("KII"): Kajima Corporation and Kajima U.S.A., Inc. The following is a nonwholly owned subsidiary of respondent KII: HOK/K Industrial, Inc.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Citations	ii
Statement of the Case	1
A. The petition misrepresents the Eleventh Circuit's holding with regard to KII.	1
Reasons for Denying the Writ	3
I. The Petition Fails To Seek Review Of Any Issue Relating To Kii.	3
II. The Petition Does Not Merit Review By This Court.	4
Conclusion	5

TABLE OF CITATIONS

Cases Cited:

Butner v. United States, 440 U.S. 48, 99 S. Ct. 914 (1979)	3
Izumi Seimitsu v. U.S. Philips Corp., et. al., 510 U.S. 29, 114 S. Ct. 425 (1993)	3

Contents

	Page
N.L.R.B. v. Hendricks County Rural Elec. Corp., 454 U.S. 170, 102 S. Ct. 216 (1981)	4
Rudolph v. United States, 370 U.S. 269, 82 S. Ct. 1277 (1962)	4
Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 44 S. Ct. 164 (1924)	5
Rules Cited:	
United States Supreme Court Rule 10	4
United States Supreme Court Rule 14	3

STATEMENT OF THE CASE

Respondent, The Mitsui Trust & Banking Co., Ltd. ("Mitsui"), has filed a brief in opposition to petition for writ of certiorari of petitioners (collectively "CP") setting forth, in detail, the factual background of this case. To avoid repetition, the Court is respectfully referred to Mitsui's brief in opposition and to the opinion of the Eleventh Circuit below as to all factual matters and the procedural history of this case. Respondent KII will confine this brief to the reasons this Court should deny the petition as it relates to KII.[1]

As discussed more fully below, this petition for certiorari should be denied because it lacks the appropriate grounds for this Court's review of the Eleventh Circuit's unpublished decision on CP's state law claims against KII.[2]

A. The petition misrepresents the Eleventh Circuit's holding with regard to KII.

CP's argument as to why this Court should grant review of the decision below as it pertains to KII is contained in a two-sentence footnote. (Pet. at 17). In its entirety, CP's argument reads:

> The Court should grant the petition not only as it applies to Mitsui, but to Kajima as well, because the lower court based its dismissal in part on its finding

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1. KII does not accept the Statement of the Facts asserted by CP in its petition.

2. CP brought five state common law claims against KII: (1) breach of contract; (2) promissory estoppel; (3) fraudulent inducement; (4) fraudulent conspiracy; and (5) tortious interference, all of which were dismissed on summary judgment by the district court.

> of no [Bank Holding Company Act] violation by Mitsui . . . If this Court concludes the lower court erred in interpreting the [Bank Holding Company Act] — as Carolyn asserts in this petition — that ruling would vitiate the lower court's granting of summary judgment for Kajima.

(Pet. at 17, n. 8).

However, the Eleventh Circuit did *not* base its decision concerning the claims against KII on any finding as to the Bank Holding Company Act ("BHCA"). It simply determined, after reviewing the voluminous record in this case, that there was insufficient evidence to support an issue with respect to CP's breach of contract and tortious interference claims against KII under Florida law. Specifically, the Eleventh Circuit held, with regard to CP's breach of contract claim, that:

> [t]he evidence in the record does not support an issue that KII's actions affected Carolyn's ability to build the proposed hotel. KII played no role in selecting Mitsui as financier of this project nor did KII cause the Japanese investors to terminate the escrow agreement or cause Carolyn to fail to obtain a letter of credit. Because we find that Carolyn's inability to close the loan rests solely on Carolyn's inability to meet several of the conditions precedent not involving KII or Mitsui, Carolyn's breach of contract claim was properly dismissed by the district court.

(Pet. App. A at 17a). The court further held that CP's claim for tortious interference against KII was "without merit" because the record established that "Mitsui provided Carolyn with an opportunity to use Turner if Carolyn met the conditions set forth in the September 26, 1990 letter." (Pet. App. A at 14a). The court also found that,

> irrespective of who was selected as the general contractor, Carolyn failed to meet many of the loan conditions and provided Mitsui with valid justification not to further extend the loan commitment.

(*Id.*).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FAILS TO SEEK REVIEW OF ANY ISSUE RELATING TO KII.

Supreme Court Rule 14.1(a) mandates that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." The questions presented by CP for review by this Court pertain solely to the BHCA. (Pet. at i). CP's claims against KII do not involve a violation of the BHCA, but instead are based solely on violations of Florida's common law. (Pet. at 3). Therefore, the questions presented to this Court do not, in any conceivable way, implicate the decision below as it relates to KII. Resolution of these questions would have no impact whatsoever on the Eleventh Circuit's decision that the evidence failed to support an issue concerning CP's state law claims against KII.[3] Thus, the petition does not properly seek review of the Eleventh Circuit's decision with regard to KII.[4]

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3. *Butner v. United States*, 440 U.S. 48, 57-58, 99 S. Ct. 914, 919 (1979) (refusing to consider state law issue, on ground that federal judges who deal regularly with questions of state law in their respective districts and circuits were in better position to determine how local courts would dispose of such issues).

4. *See Izumi Seimitsu v. U.S. Philips Corp., et. al.*, 510 U.S. 29, 34, 114 S. Ct. 425, 428 (1993) (dismissing writ where Court, in order to reach the merits, would have to address a question that was not presented in the petition nor fairly included in the question that was presented).

II.

THE PETITION DOES NOT MERIT REVIEW BY THIS COURT.

CP has not satisfied the requirements for invoking this Court's certiorari review. Supreme Court Rule 10 provides that a writ of certiorari will be granted "only for compelling reasons." Examples of "reasons" which merit a grant of certiorari include: (1) conflicts between decisions of the United States courts of appeal; (2) decisions rendered by a United States court of appeal on an important question of federal law that has not been, but should be, settled by this Court; and (3) conflicts between the decision of a United States court of appeal and relevant decisions of this Court. Sup. Ct. R. 10(a), (c). The Eleventh Circuit's unpublished decision holding that CP failed to present evidence supporting any claim against KII under state law is not in conflict with any decision of any other circuit or this Court. Nor does the decision present an important question of federal law.

Without presenting a question concerning KII, CP would apparently have this Court engage in the academic exercise of reconsidering the factual analysis painstakingly performed by the Eleventh Circuit. Supreme Court Rule 10, however, notes that "[a] petition for certiorari is 'rarely granted' based on the assertion of erroneous factual findings or the misapplication of a properly stated rule of law." Accordingly, the Eleventh Circuit's determination that CP failed to establish sufficient evidence to support claims for breach of contract and tortious interference under Florida law simply does not merit review by this Court.[5]

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5. *N.L.R.B. v. Hendricks County Rural Elec. Corp.*, 454 U.S. 170, 177 n. 8, 102 S. Ct. 216, 222 n. 8 (1981) (dismissing writ which presented primarily a question of fact, "which does not merit Court review."); *Rudolph v. United States*, 370 U.S. 269, 270, 82 S. Ct. 1277, 1278 (1962) (dismissing

CONCLUSION

For the reasons set forth above, and for those given in respondent Mitsui's brief in opposition, the petition should be denied.

Respectfully submitted,

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(Cont'd)

writ as improvidently granted where determination depended upon factual issues "and review of facts would be of no importance save to litigants themselves"); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S. Ct. 164 (1924).